In The
Supreme Court
of the
United States

October Term, 1975

No. 75-613

WALTER METCALF,

Petitioner

vs.

THE STATE OF CALIFORNIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeals,
State of California, for the Third District

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CITATIONS

MISCELLANEOUS

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The petitioner WALTER METCALF respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal, State of California, Third District, entered in this proceeding on June 11, 1975. A timely Petition for Hearing was filed on July 17, 1975, in the Supreme Court of the State of California, and said Petition was denied August 6, 1975.[1]

OPINIONS BELOW

The opinion of the Court of Appeal, which is unpublished, appears in Appendix B attached to this Petition. The Memorandum Decision and Order Denying Motion for New Trial issued by the Superior Court, County of Yolo, State of California, appears in Appendix C attached to this Petition.

JURISDICTION

The judgment of The Court of Appeal, Third District, was entered on June 11, 1975, A timely Petition for Hearing[2] was filed with the Supreme Court of the State of California on July 17, 1975, and said Petition was denied August 6, 1975. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

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[1]See notification of denial: Appendix A.

[2]See Appendix D.

QUESTIONS PRESENTED

1. Whether petitioner was denied his rights to a full evidentiary hearing on the issue of inadequacy of trial counsel contrary to the Fourteenth Amendment.

2. Whether petitioner was denied his right to effective assistance of counsel under the Sixth Amendment and/or due process of law under the Fourteenth Amendment where defense counsel at trial performed in a manner sufficient not to render the trial a sham or farce, but failed to perform in a normal, or reasonably competent manner.

3. Whether the jury's failure to follow the instructions of the Court (CALJIC 2.60)[3] where certain members of the panel discussed the defendant's failure to testify in his own behalf, after being instructed that fact should not be discussed or enter the deliberations in any way violated the defendant's rights under the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

Petitioner and co-defendant were tried and convicted in the Superior Court, State of California in the County of Yolo, of second degree burglary and grand theft, violations of Sections 459, 484, 487 of the Penal Code respectively. Mr. Metcalf was sentenced and

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[3]The Court instructed the jury as follows: "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant, acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify, *nor should this fact be discussed by you or enter into your deliberations in any way.*" (Emphasis supplied.)

placed on probation. As part of that probation he was ordered to make restitution to the victim in an amount exceeding $20,000.

Petitioner relieved privately retained trial counsel after the jury verdict, and this attorney was appointed by the Superior Court to represent Mr. Metcalf. A timely Motion for New Trial was filed with the Court alleging among other things juror misconduct and ineffective representation by counsel at trial. An evidentiary hearing was held September 30, 1974.

There was evidence that trial counsel, Mr. Englebright, consumed alcoholic beverages during the trial. Further, there was substantial evidence to show that on one occasion he appeared before the jury, prior to verdict, during the re-reading of requested testimony, in an inebriated state.

At the trial key identification testimony was provided by two young paperboys JIMMY MACIAS and DAVID HOLLAND. They were delivering newspapers and witnessed the crime. Further, upon inquiry by this attorney after his appointment by the Court, it was discovered that these two young witnesses, through the mother of JIMMY MACIAS, made application to the Sacramento Bee Secret Witness Program.

The Sacramento Bee is a metropolitan newspaper that operates a program soliciting information leading to the identification and conviction of persons responsible for perpetrating crimes. Cash rewards are paid. In short, the paper solicits informants in exchange for monetary consideration.

At trial Mr. Englebright performed a cross-examination of Mr. Macias and Mr. Holland which

superficially delved into anticipated rewards regarding their testimony. He was not thoroughly prepared to conduct an effective, knowledgeable cross-examination on this point. Further, he did not even call Mrs. Macias as a witness. She was the person who actually made most of the contacts with the Sacramento Bee.

Trial counsel, Mr. Englebright, testified at the Motion for New Trial that in the course of his representation neither he nor anyone under his employ interviewed JIMMY MACIAS, DAVID HOLLAND, or MRS. MACIAS. He further testified that while he contacted a Mr. Hill from the Secret Witness Program, he really didn't ask them anything (N.T.R.T. 87:6-28).[4] All were important witnesses. Mr. Englebright did testify that information was received from the Public Defender's Office who represented co-defendant Booth. The Court of Appeal in their decision on this point resorted to speculation: ". . . It is reasonable to assume that included among these materials were reports of pre-trial interviews with MACIAS and HOLLAND. Defendant's allegation of prejudice is, again, mere speculation."[5] Adequacy of representation cannot be left to judicial speculation.

The motive of fabrication for reward was a critical issue. In preparing for adequate cross-examination and rebuttal testimony, it was important to detail communications regarding reward anticipation with the Sacramento Bee Secret Witness Program. This attorney served Subpoenas Duces Tecum on three Bee

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[4]N.T.R.T. refers to New Trial Motion Reporter's Transcript.

[5]See Page 9 of Appendix B.

officials seeking to introduce testimony at defendant's Motion for New Trial. They would not provide information to defense counsel. He sought to compel their testimony and production of any records via this form of subpoena. Counsel for the Bee appeared the morning of the hearing and sought to have the subpoena quashed due to a faulty affidavit. The trial court never reached the affidavit issue, and instead quashed the subpoena for the following reason:

> "The Court bases its ruling upon the basis, the narrow ground that the subpoenas call only for records relating to the witnesses MACIAS and HOLLAND. They have testified. They were questioned with regard to the Secret Witness Program."
>
> "The information sought from them is for purposes of impeachment, and does not purport to be substantial evidence relating to the issue of guilt . . ." (N.T.R.T. 18:28; 19:1-6.)

The Court was advised there was an additional reason for seeking this testimony and records. IT WAS ALSO RELEVANT AND MATERIAL TO THE ISSUE OF INEFFECTIVE REPRESENTATION AT TRIAL. See N.T.R.T. 19:13-17; 8:28; 9:1-6; 12:10-14.[6]

Subsequently, this attorney attempted to call JIMMY MACIAS, MRS. MACIAS, and DAVID HOLLAND to the stand at the Motion for New Trial. The trial court further limited the hearing by upholding the District Attorney's objection to their testifying.

In terms of the defendant's Sixth Amendment rights, the quality of trial counsel's cross-examination of Msrs. MACIAS and HOLLAND depended upon the

[6]See also N.T.R.T. 15:17-23; 16:1-5.

information at hand. This attorney attempted to call them to introduce facts to show they were available to Mr. Englebright if he had interviewed the witnesses, and would have made his cross-examination substantially more effective. Indeed reasonably competent representation necessitated their interview before trial. Counsel's offer of proof at the Motion for New Trial included:

1. An anticipated reward of $1,500 by JIMMY MACIAS;
2. Actual receipt of $150 after trial;
3. Disappointment in not receiving the larger amount;
4. More accurate recall re identification sequence after trial;
5. Contact with Secret Witness Program prior to notifying police.

(N.T.R.T. 143-146.)

The offer of proof as to DAVID HOLLAND consisted of:

1. His seeing a $1,500 newsaper ad;
2. Receipt of $150 after trial;
3. Knowledge Mrs. Macias contacted the Secret Witness Program;
4. Remembered sequence of identification after trial while denying he recalled it at trial.

(N.T.R.T. 147-149:1-5)

Counsel sought to call Mrs. Macias to question her with regard to conversations with her son, DAVID HOLLAND, and the Secret Witness Program (N.T.R.T. 150:24-47). The Court interjected and excused Mrs. Macias, JIMMY MACIAS, and DAVID HOLLAND (N.T.R.T. 150:28; 151:1-6).

Failure of Trial Counsel to Discover Mrs. Arack. Due to inadequate investigation Mr. Englebright failed to discover an important witness. Mr. Metcalf contended his fingerprint that was found on the truck from which the theft occurred had an innocent origin. There was an antique show that weekend at the El Rancho Hotel in West Sacramento, California. The victim of the theft exhibited his jewelry there. Mrs. Arack was in attendance, and was found a year later by this attorney's investigator. Unfortunately, time had taken its toll. She testified she had seen Mr. Metcalf before, but could not recall exactly seeing him in March, 1973 — she could have (N.T.R.T. 56:10-19). Mrs. Arack could not recall seeing Mr. Metcalf or an Indian girl he was alleged to have been with at the El Rancho in the vicinity of Mr. Grant's truck.[7] Her most cogent statement was as follows:

> "I think I have seen him at the El Rancho in Sacramento, but I don't know just exactly whether it was that show or another show. It could have been the March, 1973 show." (N.T.R.T. 58:23-25)

Time had taken its toll upon her memory by the time she was discovered during investigation subsequent to trial. Careful inquiry and investigation would have revealed her existence at an earlier time when her memory was fresh and vivid. Trial counsel failed to investigate and discover this witness earlier. It is further evidence of superficiality thus depriving Mr. Metcalf of a substantial defense. Counsel was not careful.

[7]Mr. Grant was the victim of the burglary. His truck was broken into and jewelry items taken. The incident occurred in March, 1973 as he was departing the area after exhibiting at the El Rancho Hotel.

In short, Mr. Metcalf did not receive reasonably competent representation at trial. Mr. Englebright was ill-prepared to conduct an effective cross-examination of Mr. Macias and Mr. Holland, failed to interview or call Mrs. Macias as a witness, and was, thus, not prepared to effectively impeach the testimony of the two boys with respect to anticipated reward from the Sacramento Bee. Nor did he investigate or develop any information from the Sacramento Bee Secret Witness Program and its officials. Further, he failed to discover Mrs. Arack and develop the theory Mr. Metcalf's fingerprint could have been placed on the truck at the exhibit at the El Rancho Hotel prior to the theft.

Jury Misconduct. After receiving the instructions of the Court and being read CALJIC 2.60 quoted in Footnote 3, several jurors disobeyed its content. Juror DaMASSA recalled several jurors remarking upon the defendant's failure to testify upon entering the jury room (N.T.R.T. 33:15-28; 34:1-12). Juror JOHNSON recalled a comment on the subject inside the jury room, at the beginning of deliberations (N.T.R.T. 39:5-24). Juror HUFF testified the defendant's failure to take the stand was discussed in the jury room (N.T.R.T. 45:15-22). Jury Foreman GOBRON testified the subject was discussed about halfway through deliberations (N.T.R.T. 51:2-21).

It must be stressed at this point that CALJIC Instruction 2.60 reads in pertinent part, ". . . You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way."

REASONS FOR GRANTING THE WRIT

1. Denial of Full Evidentiary Hearing. The Court of Appeal at Page 8 of their opinion holds that the defendant carries the burden of demonstrating that he was prejudiced by failure of counsel. Defendant METCALF attempted to meet this burden at his Motion for New Trial, but was prohibited by rulings of the Court: (1) quashing the Subpoena Duces Tecum served on officials of the Sacramento Bee, and precluding Mr. Metcalf's counsel from calling Mr. Macias and Mr. Holland, key identification witnesses, and Mrs. Macias to detail reward discussions with the newspaper and the two key witnesses. Further, the trial court was advised and fully aware that the above witnesses were also being presented on the issue of a denial of Mr. Metcalf's fundamental right to effective representation by counsel in all phases of the defense.[8] *Powell* v. *Alabama* (1932) 287 U.S. 45. The right to counsel has been described as most important. ". . . This is one of the safeguards deemed necessary to insure fundamental human rights of life and liberty." *Glasser* v. *United States* (1941) 315 U.S. 60, 69.

The importance of a hearing was stressed long ago in *Powell*:

> ". . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by or appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the Constitutional sense." *Powell* v. *Alabama*, supra., P 69.

[8]See N.T.R.T. at pages 19:13-17; 8:28; 9:1-6; 12:10-14.

Further, petitioner has a right under the due process clause to a meaningful hearing. *Armstrong* v. *Manzo* (1965) 380 U.S. 545, 552; *Goldberg* v. *Kelly* (1970) 397 U.S. 254.

For the state to place the burden of establishing ineffective counsel upon the defendant, and thereafter the Court hearing the matter denies the defendant an opportunity to fully present his case in a factual context is a denial of fundamental fairness, and thus, due process of law of the highest order. It is shocking to both conscience and a universal sense of justice. Mr. Metcalf was denied his right to fair procedure and due process of law.

The matter was compounded by the Court of Appeal when they engage in judicial speculation as the adequacy of petitioner's representation. The Court of Appeal wrote:[9]

> "He (the trial attorney) testified that counsel for defendant BOOTH had exchanged substantial amounts of information. *It is reasonable to assume that included among these materials were reports of pretrial interviews with Macias and Holland . . .*"
>
> "We reject defendant Metcalf's assertion that he was prejudiced by counsel's failure to make further inquiries as to the Sacramento Bee Secret Witness Program in order to establish a motive for fabrication by the two newsboys. Counsel's cross-examination of both newsboys demonstrates an attempt to impute such a motive to them, and this theory was argued to the jury . . ."

Was the manner and thoroughness with which counsel conducted the presentation competent? Effective?

[9]See PP 9-10 of Appendix B.

Merely because the point was argued does not satisfy the inquiry.

> "... Representation involves more than courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance. Such omissions, of course, will rarely be visible on the surface of the trial, and to that extent the impression of a trial judge regarding the skill and ability of counsel will be incomplete." *Moore* v. *United States* (1970) 432 F.2d 730, 739.

The view of appellate justices is likewise incomplete.

Petitioner was denied the opportunity to present the facts associated with a denial of his right to effective assistance of counsel. This Court has not discussed the Fourteenth Amendment's right to due process in the context of the type and breadth of the hearing state courts are required to hold. Such a decision would have a substantial and important effect upon procedural unification among the states. From the standpoint of petitioner, a decision by this honorable court is of paramount importance to his liberty.

2. *Petitioner's Right to Effective Representation in a Reasonably Competent Manner.* This Court has steadfastly held a defendant has the right to effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments, and such requirements are applicable to the States. *Argersinger* v. *Hamlin* (1971) 407 U.S. 25, 27; *Gideon* v. *Wainwright* (1962) 372 U.S. 335, 340.

This Court has yet to define the standard by which "effective assistance" of counsel is to be measured.

Several divergent views have emerged. There is conflict in decisions among the federal Circuit Courts of Appeal, and since a fundamental federal right is at issue, the decisions produce conflict and disunity among state decisions as well. The importance of this issue to this nation's cherished principals of liberty and rights of individuals cannot be overstated:

> "Of all the rights than an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Justice Marshall dissenting in *Brescia* v. *New Jersey* (1974) 417 U.S. 921, 923.

By what legal standard is this precious and pervasive right to be measured?

The California Court of Appeal defined inadequate representation as that which reduces the proceedings to a farce or sham, and further requiring withdrawal of a crucial defense.[10] This test is also known by the label "Mockery of Justice.: It is utilized by the majority of Federal Courts:[11]

> "One common standard today is the 'Mockery of Justice' test under which representation is ineffective only where it makes the trial such a sham that it shocks the conscience of the Court. The 'Mockery' test requires such a minimal level of performance from counsel that it is itself a mockery of the Sixth Amendment."

There is a growing divergence of law on this issue. Two leading writers and several Circuit Courts of Ap-

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[10]See Page 8 of Appendix B.

[11]Bazelon, David L. "The Defective Assistance of Counsel," 42 Univ. of Cincinnati L. Rev. 1, 28-29 (1973).

peal have addressed the issue and have adopted a test operationally described as a malpractice test. Finer urges counsel's performance under the Sixth Amendment should be evaluated in the light of normal custom and skill.[12] Bazelon specifies counsel's performance should be measured by a standard of reasonable competence associated with an experienced defense attorney.[13]

The leading case adopting a standard of normal competency in assuring counsel's performance under the Sixth and Fourteenth Amendments is *Moore* v. *United States* (3rd Cir. 1973) 432 F.2d 730, 737. The Court in *Moore* exhibited considerable insight into the problem:

> ". . . Representation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange their attendance. Such omissions, of course, will rarely be visible on the surface of the trial, and to that extent the impression of the trial judge regarding skill and ability of counsel will be incomplete." *Moore* v. *United States* (1970) 432 F.2d 730, 739.

The normal competency standard was also adopted in the case of *United States ex. Rel Green* v. *Rundle* (1970) 434 F.2d 1197, 1202. The very recent case from the District of Columbia Circuit in adopting a Sixth

[12]Finer, Joel J. "Ineffective Assistance of Counsel" 58 Cornell L. Rev. 1077, 1078 (1973).
[13]Bazelon, David L. *Ibid*. PP 32-33.

Amendment standard of reasonable competence observed: "A defendant is entitled to the reasonable competent assistance of an attorney acting as his diligent advocate." *United States* v. *DeCoster* (D.C. Cir. 1973) 487 F.2d 1197, 1202. The case adds:

> "This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses, but also those the government intends to call when they are accessible . . ." See *United States* v. *DeCoster*, supra., P 1204.

3. Importance of the Question. This Petition is filed to seek uniformity of decision in defining the standard to be applied in measuring a defendant's right to the effective assistance of counsel. A ruling by this Court which is the highest tribunal could unify case decisions bearing upon this most basic federal constitutional right. A right to be represented by counsel by necessity heavily implies a qualitative approach in assuring persons coming before the bar of justice realization of their right to effective assistance. The sham or mockery standard falls far short of this goal. It is not enough that an individual receives a prima facie defense.

The farce or sham test fosters and facilitates marginal representation. With liberty being the most cherished principle in our national fabric, the Sixth Amendment inherently implies a greater burden upon the performance of defense counsel than merely not reducing his client's case to a sham, farce, or mockery of justice. With liberty at stake, a defendant at the very least deserves a reasonably competent defense

viz. reasonable competent in the light of normal skill and custom.

The farce or sham test is one associated with minimal compliance, not adequacy of representation. It detracts from a person's full realization of what has been described as our most basic and pervasive right to counsel.[14]

Mr. Metcalf did not receive effective representation at trial. While trial counsel attempted cross-examination of witnesses MACIAS and HOLLAND on the issue of reward anticipation, counsel was ill-prepared having not sought information from: (1) the witnesses themselves via interview; (2) Mrs. Macias a prime discussant of the reward situation; (3) officials of the Sacramento Bee Secret Witness Program. Further, the potentially helpful testimony of Mrs. Arack was lost due to counsel's failure to adequately investigate the defense posture at an early date. Mr. Metcalf did not realize the services of reasonably competent counsel.

4. Petitioner's Right to Have the Jury Follow the Court's Instructions. The Court, at the conclusion of the trial, instructed the jury on points of law. Among the many instructions was CALJIC 2.60, the full context of which is set forth in Footnote 3 of this Petition. This instruction was designed to protect the defendant's Fifth and Fourteenth Amendment rights.

It was clear from evidence introduced at defendant's Motion for New Trial that certain jurors commented upon the defendant's failure to take the stand. Juror

[14] See Schaefer, "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 8 (1956).

HOLLAND recalled a woman juror stating she wondered why they didn't take the stand (N.T.R.T. 27:1-16). Juror DaMASSA recalled several jurors remarking upon the defendant's failure to testify upon entering the jury room (N.T.R.T. 33:15-28; 34:1-12). Juror JOHNSON recalled a comment on the subject inside the jury room, at the beginning of deliberations (N.T.R.T. 39:5-24). Juror HUFF testified the defendant's failure to take the stand was discussed in the jury room (N.T.R.T. 45:15-22). Jury Foreman Grobron testified that the defendant's failure to take the stand was kicked around a little bit during the process of discussing the case inside of the jury room (N.T.E.T. 51:2-21).

Based on the testimony the trial court concluded there was no miscarriage of justice. The latter portion of the instruction forbids discussion by the jury of the defendant's failure to take the stand and testify on their own behalf. It is clear from the record some jurors disobeyed the Court's instruction. Is the jury free to disobey or vary the Court's instruction?

There is little law directly upon this point. Far back in the history of this Court it has been held that the duty of the jury to follow the law as laid down by the Court is a cornerstone of jury trials. *Sparf* v. *United States* ( ) 15 U.S. 51, 64. It does not appear from the research conducted that this Court has had occasion to rule on this issue since *Sparf*. It is submitted that the jury's failure to follow the instructions as laid down by the Court resulted in a denial of a right fundamental to basic fairness in a criminal jury trial. Thus, Mr. Metcalf was deprived of due process of law in this re-

gard. The Court erred in failing to grant Mr. Metcalf a new trial due to the jury's indiscretion.

Respectfully submitted,

Dated: October 20, 1975

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Counsel for Petitioner

APPENDIX

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 6 1975

I have this day filed Order

HEARING DENIED

In re: 3 Crim. *No.* 7916

People

vs.

Metcalf, et al.

Respectfully,

G. E. BISHEL
Clerk

81240-877 2-75 3M OSP

APPENDIX

FILED

NOV 13 1974

MILDRED SANDERSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF YOLO

--oOo--

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. WALTER METCALF and WALTER JOHN BOOTH, Defendants.	No. 4820 MEMORANDUM DECISION AND ORDER DENYING MOTION FOR NEW TRIAL.

--oOo--

Each of the defendants has moved for a new trial on the grounds specified in written motions on file. The Court will discuss each contention separately.

I

MISCONDUCT OF THE JURY

Of the eight jurors who testified at the hearing on the Motion for New Trial, five recalled comments by jurors about the failure of the defendants to testify. Their testimony, briefly

summarized, was as follows:

Holland: Subject was not discussed, but mentioned once by a lady juror who said she "wondered why" the defendants didn't take the stand.

DaMassa: A casual statement by a juror, as the jury went into jury room, that she "wondered why" the defendants did not testify.

Johnson: A single comment by a woman, made casually, no other comments.

Huff: One or two jurors questioned why the defendants didn't take the stand; there was no response or discussion.

Gobron: Three or four people kicked around the fact that the defendants didn't testify, that it seemed strange; this occurred half way through their deliberations.

Three of the eight jurors, i.e., Ward, Teel and Martinez, didn't recall any comments being made.

With the single exception of juror Gobron, the testimony establishes, at most, a casual remark or two wondering why, or considering it strange, that the defendants did not testify. The thrust of the four jurors' testimony indicates that one remark was made at the onset of their deliberations and never again. Only the testimony of juror Gobron tends to contradict the time, number and nature of comments. The Court believes the testimony of juror Gobron should be given less weight than that of the other jurors. His memory and ability to recall matters precisely appeared to be poor. The manner in which he completed the verdicts, as foreman,

is an illustration of his shortcoming in this respect.

The recited juror's comment was casual and incidental. It did not prevent a fair and due consideration of the defendants' cases and, if error, was a harmless error beyond a reasonable doubt. There was no miscarriage of justice. People v. Lopez 251 Cal.App.2d 918, 923; State v. Ratliff 490 S.W. 2d 844, 845.

II

IMPEACHMENT OF WITNESS GRANT

The Court received evidence during the trial regarding a conviction of LEON GRANT, the victim of the offenses charged herein, for felony check-writing in Arizona. The offense occurred in 1964, involved a $30 check, and Mr. Grant served five (5) months at the state correctional farm. The evidence and argument with respect to the use of this prior conviction for impeachment purposes was extensive, was carefully considered by the Court at the trial, and counsel for defendants have disclosed no reason why the Court should change its ruling. The use of such prior conviction for impeachment purposes properly was excluded under Evidence Code § 352.

III

ERROR DURING VOIR DIRE

A prospective juror, Mr. David, made a vague reference to the fact that one of the defendants may have given him a bad check, but "I couldn't identify the guy, to tell or not". Any prejudicial effect of this remark was cured by the stipulation of all counsel that neither of the defendants had been involved in passing a bad check to Mr. David, the excuse of Mr. David by the

Court and the Court's admonition to the jury to "Put out of your mind any comments which Mr. David may have made with respect to writing bad checks, he was mistaken".

IV

COMPETENCE OF DEFENDANT METCALF'S COUNSEL

The rule in California with regard to competence of counsel is that the lack of competence or diligence must result in the withdrawal of a crucial defense and/or reduce the trial to a farce or sham. People v. Langley (1974) 41 Cal.App.3d 339, 350.

The Court finds no merit in this contention. At all times during the trial Mr. Englebright was aggressive, protective of his client's interest, and rigorous in his cross-examination of crucial witnesses, especially Macias and Holland.

V

INTOXICATION OF DEFENDANT METCALF'S COUNSEL

From the evidence at the hearing on this motion, it is clear that Mr. Englebright appeared in Court under the influence of alcohol after submission of the case to the jury, but before the verdict was returned. There is only sketchy and unconvincing evidence of any significant intoxication during the evidentiary phases of the trial.

Of the eight jurors who testified at the Motion for New Trial hearing, six did not observe Mr. Englebright to be under the influence at any time, while two did. These two, Holland and Ward, testified to a suspicion of intoxication based on Mr. Englebright's appearance and actions. Their testimony related to two occasions,

one of which was mutually observed (and was after the submission of the case to the jury); the other being observed only by Holland on the second or third day of the trial.

The Court finds that Mr. Englebright was not intoxicated during the evidentiary phases of the trial, that he was under the influence of alcohol after the case was submitted to the jury, but that his intoxication and conduct was not such as would adversely affect the outcome of the case, deny either of the defendants due process, nor reduce the trial to a farce or sham.

VI

SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE CONVICTION OF DEFENDANT BOOTH

The witness Macias, whose testimony forms the principle basis for the conviction of defendant Booth, identified Booth on a number of occasions but never "positively". The various interchanges between counsel at trial and Macias gave the jury ample opportunity to evaluate the weight to be given Macias' identification. These extensive interchanges fully disclosed the basis of Macias' identification despite the fact that he declined to categorize his identification as "positive" or "for sure".

VII

NEWLY-DISCOVERED EVIDENCE

A new trial may be granted on the basis of newly-discovered evidence only when the Court concludes that a different result probably would occur from the presence of the evidence at a new trial. People v. Kageler (1973) 32 Cal.App.3d 738.

In this instance the new evidence consists chiefly of additional impeaching evidence and seven items of jewelry (found by the Court to be jewelry stolen during the crime charged in the Information). The items of jewelry were received by RONALD PEVNY, a defense witness, after an anonymous, post-trial phone call. Testimony of Pevny's post-trial communication with witness Mullenix suggests a link between Mullenix and the jewelry. Mullenix testified at the trial that he stole the jewelry.

The Court believes, as seemingly the jury did, that the testimony of Mr. Mullenix was incredible and unworthy of belief. The Court remains firm in that conviction.

The mysterious appearance of a few items of the stolen jewelry, which could have been arranged by one or both of the defendants, is insufficient to cause the Court to conclude that a new trial would result in a different verdict because of the presence of such jewelry.

VIII

FAILURE TO MOVE FOR SEVERANCE AND MISTRIAL

Defendant Booth contends that the failure of his counsel to move for a severance of his trial from that of the defendant Metcalf, and his failure to ask for a mistrial during voir dire examination of the jury, constituted a denial of due process. The Court finds no merit in these contentions.

IX

THE TOTAL CIRCUMSTANCES

Viewing the trial of the defendants in its totality, the

Court believes that their trial was fair, aggressively and ably contested by defense counsel and that the defendants were not denied due process of law. The evidence sustains the verdicts.

X

CONSTITUTIONALITY OF DEFENDANT BOOTH'S PRIOR CONVICTIONS

The issue of the validity of the prior convictions of defendant Booth was submitted to the Court upon the certified copies of the records of such convictions. The Court finds the prior convictions charged in Count IV, VI and VII are valid. The Court strikes the prior conviction charged in Count V as being invalid.

XI

The defendants' Motions for New Trial are denied.

Dated: November 13, 1974.

Judge of the Superior Court

APPENDIX

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WALTER METCALF and WALTER JOHN BOOTH, Defendants and Appellants.	3 Crim. 7916 (Sup. Ct. No. 4820)

Defendants appeal from the judgments entered following jury convictions on charges of second degree burglary (Pen. Code, § 459) and grand theft (Pen. Code, §§ 484, 487).[1]

Defendants' contentions on appeal can be summarized as follows: (1) no substantial evidence exists in the record to support the verdicts as against defendant Booth; (2) defendant Metcalf was denied his constitutional right to

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[1] The verdict forms furnished the jury did not refer to the degree of the burglary. After verdict, counsel stipulated that the court fix the degree as to each defendant at second degree burglary.

effective assistance of counsel at his trial; and (3) the trial court erred by denying the motion for new trial.[2]

Leon Grant, a jewelry salesman, was attending an antique show in West Sacramento on the weekend of the 24th and 25th of March 1973. Grant had jewelry in his possession of a value of approximately $47,000. He exhibited his jewelry to antique dealers, displaying it at his pickup truck parked near the entrance to the show. Grant was staying at the El Rancho Motel, the location of the antique show.

On Sunday, March 25, Grant left the motel at approximately 8:30 a.m., looking for a place to eat. He put the jewelry, contained in four cases of varying sizes, on the floor of his pickup truck on the passenger side, covering the cases with clothing. He stopped at a restaurant, leaving the pickup parked outside with the doors and windows locked.

Grant was in the restaurant only a short time, but when he returned to the truck, the cases were gone. The wing vent and window on the passenger side were open.

On the morning of March 25, David Holland and Jimmy Macias were selling papers outside the restaurant where

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2 Defendants purport to appeal from the order denying motion for new trial, which order is not separately appealable but may be reviewed on appeal from the judgment. (People v. Williams (1973) 36 Cal.App.3d 262, 264.)

Grant stopped. They observed two individuals drive into the restaurant parking lot in a brown Oldsmobile or Buick. The boys attempted to sell them a newspaper without success. One of the individuals went over to a newspaper vending machine, bought a newspaper and stood as if reading it while looking into the restaurant. The other person walked between Grant's pickup and a station wagon parked next to it, and returned with two suitcases. He put the cases in the back seat of his car. Holland was unsure whether one or two trips were made. The individual who had handled the cases then walked over to the two boys, pulled two dollars out of a gold money clip and said "screw off."

Holland identified defendant Metcalf as the individual who had removed the cases. He was unable to identify the individual who had stood by the newsrack. Macias also identified Metcalf as the person who had carried the suitcases, and identified defendant Booth as the individual who had stood by the paper rack. Both boys testified that the money clip belonging to Metcalf was similar to the one in the possession of the individual in the restaurant parking lot.

Metcalf's fingerprint was lifted from the passenger side of the pickup. A car matching the description of that observed by the two boys was in defendant Metcalf's possession three weeks later.

The defense sought to establish alibis and to impeach the identifications by the two boys. Some witnesses testified that defendant Booth had been in attendance at a party until 4 a.m. the morning the crime was committed, and left the party quite intoxicated. Another witness testified that he had talked with Booth on the phone at the approximate time the crime was committed. Two other witnesses testified that they had met defendant Metcalf in Tacoma, Washington, over that weekend to discuss the possible purchase of construction equipment.

The defense called one John Mullinex, an inmate of the Washington State penal system, who testified that he himself had perpetrated the crime. He testified that upon later reading of defendants' suspected involvement, he wrote letters to the Sacramento Bee and the Yolo County District Attorney's office in an attempt to correct the situation.

The defendants also sought to establish a motive on the part of Macias and Holland to fabricate, by attempting to elicit evidence that they had applied for a reward under the Sacramento Bee "Secret Witness" program. Macias testified that application to the program had been made, but as of the date of trial no payment had been forthcoming.

In rebuttal, the prosecution introduced evidence that few members of the public had been near Grant's pickup during the antique show. An official from the United States

Post Office testified that a letter which Mullinex claimed had been mailed from Los Angeles proclaiming his guilt of the crimes charged had actually been mailed from Sacramento.

Sufficiency of the Evidence To Support Defendant Booth's Conviction

Defendant Booth, attacking the identification testimony of the witness Macias, argues that there is insufficient evidence to support his conviction. He emphasizes the boy's hesitancy in divulging information to the police the day of the crime and discrepancies and uncertainties in his description of the man whom he had seen standing by the news rack at the restaurant. Defendant Booth asserts that no positive identification of him was made, and therefore in the absence of other evidence connecting him to the crime or to his codefendant Metcalf, the test of substantial evidence is not satisfied.

It is settled law that before a judgment may be set aside, "'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.'" (People v. Newland (1940) 15 Cal.2d 678, 681.) The appellate court must view the evidence in a light most favorable to the judgment and assume the existence of every fact reasonably deducible from the evidence. (People v. Reilly (1970) 3 Cal.3d 421, 425; People v. Sweeney (1960) 55 Cal.2d 27, 33.) We note however, that the substantial evidence rule "mandates consideration of the weight of the evidence before

deferring to the conclusions drawn from the evidence by the trier of fact. '[I]n determining whether the record is sufficient . . . the appellate court can give credit only to "substantial evidence, i.e., evidence that reasonably inspires confidence and is 'of solid value.'"'" (People v. Kunkin (1973) 9 Cal.3d 245, 250, quoting from People v. Bassett (1968) 69 Cal.2d 122, 139.)

The function of the reviewing court is not to determine whether or not guilt was proved beyond a reasonable doubt, but whether "there is substantial evidence to warrant the finding of guilt by the jury, . . ." (People v. Hernandez (1971) 19 Cal.App.3d 411, 420; People v. Mosher (1969) 1 Cal.3 379, 395.) "If the circumstances reasonably justify the [conviction], the opinion of the reviewing court that those circumstances might also be reasonably reconciled with the innocence of the defendant will not warrant interference with the determination . . . ." (People v. Newland, supra, 15 Cal.2d at p. 681; People v. Reilly, supra, 3 Cal.3d at p. 425; People v. Robles (1962) 207 Cal.App.2d 891, 895.)

Defendant Booth overlooks the fact that Macias testified that he (Booth) was the man who had stood by the newsrack and served as a lookout for the burglary. The asserted discrepancies and inconsistencies in Macias' identification testimony were explained by him and affected the weight and value of his testimony in a manner to be

determined solely by the jury. While the evidence connecting Booth to the offense may not have been the strongest, the jury was certainly entitled to conclude therefrom that Booth had been a participant in it. A mere weakness of identification testimony is a matter to be addressed to the trier of fact and is not a cognizable argument on appeal. (People v. Williams (1959) 53 Cal.2d 299, 303; People v. Cook (1968) 263 Cal.App.2d 638, 641.) The finding of the trier of fact on an identification issue will not be disturbed "unless the evidence of identity can be construed as inherently improbable or incredible as a matter of law, . . ." (People v Samaniego (1968) 263 Cal.App.2d 804, 812.) Defendant has not made such a showing in the instant case. Defendant herein asks that we reweigh and reinterpret the identification evidence in a manner consistent with his innocence; such is not the function of an appellate court. (People v. Bozigian (1969) 270 Cal.App.2d 373, 376-377.)

Denial of Right to Effective Assistance of Counsel

Defendant Metcalf urges that he was denied effective assistance of counsel in two respects: (1) that his retained lawyer at trial failed to investigate adequately possible defenses, and (2) that his lawyer's intemperance prejudiced him in the eyes of the jury.

Defendant's threshhold complaint is that his retained attorney failed to hire an investigator. He further asserts that his attorney made minimal attempts to ascertain whether

he, Metcalf, might have innocently left his fingerprint on the victim's vehicle while it was parked at the antique show.

Inadequate representation by counsel is that which reduces the proceedings to a farce or sham. (People v. Aikens (1969) 70 Cal.2d 369, 379; People v. Hill (1969) 70 Cal.2d 678, 688-689.) Defendant must show withdrawal of a crucial defense from the case. (Hill, supra, at p. 689; People v. Ibarra (1963) 60 Cal.2d 460, 464.) The defendant has the burden of demonstrating as a reality that he was prejudiced by failure of his counsel; it cannot be a matter of mere speculation. (People v. Thompson (1967) 252 Cal.App.2d 76, 92; People v. White (1963) 222 Cal.App.2d 774, 776.) The choice of strategy and tactics is up to the judgment of counsel, and such decisions predicated upon full awareness of possible defenses will not subject trial counsel to the allegation of inadequacy by a reviewing court. (People v. McDowell (1968) 69 Cal.2d 737, 746; see People v. Coogler (1969) 71 Cal.2d 153, 169; People v. Miller (1972) 7 Cal.3d 562, 571-572.) Thus, counsel has the burden "'to conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf both at the pleading stage [citation] and at trial.'" (People v. Shells (1971) 4 Cal.3d 626, 630.)

Defendant Metcalf has not met his burden of showing failure to make an adequate investigation as to his presence at the antique show. The record does show an attempt by counsel through contact with a potential witness to establish the presence of defendant at the antique show but to no avai'. Presumably, had defendant Metcalf been at the antique show, he would have been able to indicate to his attorney various persons with whom he had contact, thus enabling his attorney to present such a defense.

Defendant Metcalf's contention that he was prejudiced by his attorney's failure to interview Macias and Holland prior to trial must fail. The attorney testified at the new trial motion that he had received substantial quantities of information from the public defender's office prior to trial. He also testified that counsel for defendant Booth had exchanged substantial amounts of information. It is reasonable to assume that included among these materials were reports of pretrial interviews with Macias and Holland. Defendant's allegation of prejudice is, again, mere speculation.

We reject defendant Metcalf's assertion that he was prejudiced by counsel's failure to make further inquiries as to the Sacramento Bee Secret Witness program in order to establish a motive for fabrication by the two newsboys. Counsel's cross-examination of both newsboys demonstrates an attempt to impute such a motive to them, and this theory was argued to the jury. It therefore appears that the jury was permitted to consider a possible improper motive influencing

this testimony.

Defendant Metcalf also contends that his attorney's intoxication prejudiced him in the eyes of the jury. Defendant does not allege that counsel's intoxication handicapped his ability to handle the case nor does he specify in what manner the intemperance prejudiced him. He asserts "Such prejudice resulted from the obvious sense of defeat which must have been conveyed to the jury by [counsel's] drunken appearance at the very end of the trial."

To further his claim of intoxication, defendant refers to portions of the transcript of proceedings in the presence of the jury after submission of the case but before the verdict was returned. The new trial motion was specifically addressed to this issue. At that time the trial court heard testimony of eight of the jurors as to their impression of counsel's sobriety. In its memorandum decision and order denying the motion for new trial, the trial court addressed the issue of counsel's intoxication and found "that [counsel] was not intoxicated during the evidentiary phases of the trial, that he was under the influence of alcohol after the case was submitted to the jury, but that his intoxication and conduct was not such as would adversely affect the outcome of the case, deny either of the defendants due proc nor reduce the trial to a farce or sham."

The trial court was in a position to observe counsel's conduct during trial, to discern any deleterious

impact it may have had on the jury and to weigh the prejudicial effect thereof. The trial court's evaluation of the issu is supported by the record of the proceedings at trial and by substantial evidence received on the hearing of the motion for new trial. Defendant having failed to demonstrate the reality of prejudice, his contention must be rejected.

Similarly, defendants' allegation that their trial counsel were both inadequate in failing to move for a mistrial during the voir dire of the jury is without merit.[3] The record discloses that during jury voir dire a prospective juror indicated that one of the defendants may have passed a bad check to him ten years previously. His basis for so concluding was that the particular defendant had the same last name as the individual who had defrauded him. Thereafter, the prosecution and defense stipulated that neither defendant had ever been involved in passing a bad check to the prospective juror. The court then admonished the prospective jurors to put out of their minds any comment made with respect to defendant's writing bad checks because the prospective juror who so spoke was mistaken.

Defendants assert that the incident created the implication that they were men of dishonest backgrounds and character, and that the remarks were thus highly prejudicial and required a motion for mistrial. They conclude therefrom

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[3] This contention was also advanced as basis for new trial, the denial of which, upon this ground among others, is assigned as error on appeal. Considered in both contexts in which it is raised on appeal, the contention is without merit.

that their trial counsel were inadequate for failing so to move.

The record discloses, however, that the prospective juror was not at all sure that either of the two defendants was the individual who had defrauded him. Rather, he indicated that it was a mere possibility, whereupon counsel stipulated that the contrary was true, and the court admonished the prospective jurors to disregard the remark. We presume that the jurors ultimately selected observed the admonition and no implication to the contrary is suggested by the record.

Defendants' New Trial Motion

Defendants advanced several specifications of error as grounds for new trial and on appeal argue that the trial court erred in rejecting their claims and denying the motion.

First, defendants assert jury misconduct in that several members of the jury commented on defendants' failure to testify. There was juror testimony at the new trial hearing that one or more jurors commented either prior to or during deliberations upon defendants' failure to take the stand. Defendants allege that the rule of Griffin v. California (1965) 380 U.S. 609, extends to such references by jurors as well as by the court or the prosecutor.[4]

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[4] The trial court considered this issue in its memorandum of decision and order denying new trial. Therein the court evaluated all the testimony of the jurors and rejected that of the foreman that three or four jurors discussed the failure to testify during deliberations on the basis that his memory and ability to recall were imperfect. Thus, the trial court concluded, a single remark, casual in nature, was made at the outset of jury deliberations. The court concluded that the comment did not prevent a fair trial and, if error, was harmless beyond a reasonable doubt.

The trial court gave the following instruction: "It is as [sic]constitutional right of a defendant in a criminal trial that he may not be compelled to testify. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way." (CALJIC 2.60 (1973 rev.).) The jury was also instructed on the right of the defendants to rely on the state of the evidence.

Error is committed within the meaning of Griffin v. California, supra, 380 U.S. 609, whenever the prosecutor or the court comments upon the defendant's failure to testify. (People v. Vargas (1973) 9 Cal.3d 470, 475; People v. Modesto (1967) 66 Cal.2d 695, 610-611.) The Griffin court delineated its holding as follows: "We ... . hold that the Fifth Amendment, in its direct application to Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (Fn. omitted.) (380 U.S. at p. 615.) In response to the argument that the inference of guilt for failure to testify would naturally be drawn in any event, the Court stated, "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." (380 U.S. at p. 614.)

The trial court found, based upon substantial evidence at the new trial hearing, that the comment complained of consisted of a single, random, casual remark by one juror at the outset of deliberations. Accordingly, the resolution of this issue does not require an analysis of the legal basis (or lack thereof) of the concluding clause of the standard instruction given by the court, for it is clear from a literal application of that clause to the facts herein that the forbidden subject was neither discussed nor entered into the jury's deliberations.

Second, defendants contend that the trial court erred by failing to permit the impeachment of prosecution witness Leon Grant by showing that he had suffered a prior felony conviction for passing a bad check. The trial court excluded admission of the evidence as more prejudicial than probative (Evid. Code, § 352) on the basis that the date of the conviction was remote under the rule of People v. Beagle (1972) 6 Cal.3d 441, 453.

The trial court has discretion to exclude evidence of an impeaching felony against a witness. (See People v. Carr (1973) 32 Cal.App.3d 700, 704.) No abuse of that discretion is shown herein. The prior felony conviction took place ten years prior to Grant's testimony at trial, and the witness had led a blameless life in the interim. Moreover, no prejudice resulted to defendants since Grant's testimony merely established the elements of the charged crimes and did

not in any way implicate defendants in their commission.

Third, defendants assert that the trial court erred by denying their new trial motion on grounds of newly discovered evidence. The evidence upon which defendants rely is as follows: Ron Pevny, a friend of defendant Booth, wrote a letter following the trial to John Mullinex, the prison inmate who had claimed guilt of the jewelry theft. Subsequently, Pevny received a phone call from an unidentified source who told Pevny that a package would be received in the mail which would have a bearing on the case. When received by Pevny, the package, mailed from Los Angeles, contained seven pieces of Indian jewelry.

Defendants assert that an inference can be drawn that the jewelry was mailed at the instance of Mullinex because Pevny had asked him if there was anything further he could do to prove defendants' innocence.

A motion for new trial predicated upon newly discovered evidence is within the discretion of the trial court and is looked upon with disfavor. In the absence of a clear showing of abuse of discretion, the ruling of the trial court thereon will not be reversed on appeal. (People v. Owens (1967) 252 Cal.App.2d 548.) The defendant must show that the evidence, and not merely its materiality, is newly discovered; that it is not cumulative; that a different result would be probable on retrial, and that the parties could not with reasonable diligence have produced the evidence at the original

trial. The showing must be supported with the best evidence available. (People v. Williams (1962) 57 Cal.2d 263, 270; People v. Owens, supra, 52 Cal.App.2d at p. 552.)

The trial court specifically found that the "newly-discovered evidence" would not result in a different verdict. The question of the effect upon the case of newly discovered evidence is peculiarly addressed to the discretion of the trial court, and only when a clear abuse of discretion is shown will the action of the court be disturbed on appeal. (People v. Love (1959) 51 Cal.2d 751, 755-756; People v. Greenwood (1957) 47 Cal.2d 819, 821.) The court has an enlarged discretionary power in ruling upon new trial motions predicated on newly discovered evidence. (People v. Gaines (1962) 204 Cal.App.2d 624, 629.) No abuse of the trial court's discretion is shown here.

The appeals from the orders denying motions for new trial are dismissed. The judgments are affirmed.

PUGLIA, P. J.

We concur:

REGAN, J.

PARAS, J.

APPENDIX

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent vs. WALTER METCALF, et al., Defendant-Appellant	3 CRIM 7916 CRIM NO. _____

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PETITION FOR HEARING

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IN THE SUPREME COURT

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vs.	CRIM NO. _____
WALTER METCALF, et al., Defendant-Appellant	

PETITION FOR HEARING

TO THE HONORABLE DONALD R. WRIGHT, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

WALTER METCALF, defendant and appellant in this matter respectfully petitions this court for a hearing to consider the decision of the Court of Appeal of the State of California, Third Appellate District, filed in this action on June 11, 1975 affirming appellant's conviction.

A copy of the opinion of the Court of Appeal is attached to

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this petition as Appendix A.

This petition is filed to seek uniformity of decisions and to settle extremely important questions of law in the enforcement of the penal laws of this state and fair procedure relating to:

1. The right of a defendant involved in criminal litigation to effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 13 of the Constitution of the State of California where:
   (a) Trial counsel failed to adequately investigate the case resulting in the denial and/or impairment of a substantial defense;
   (b) Trial counsel appeared before the jury prior to verdict in an inebriated state, and there was evidence of his consuming alcoholic beverages during trial;
   (c) The trial court precluded necessary factual inquiry into the adequacy of trial counsel contrary to due process of law.
2. The verdict was infected by jurors failing to abide by and follow CALJIC INSTRUCTION 2.60 wherein certain of them commented upon defendant's failure to testify thereby depriving him of his right to remain silent guaranteed by the Fifth and Fourteenth Amendments of the United States Constitutior and Article I, Section 13 of the Constitution of the State of California.

A hearing is necessary not only to settle important questions of law, but also to resolve conflicts between the instant decision, questions of fundamental fairness under due process of law, and

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cases decided by this court and federal courts of appeal, since basic federal rights are at stake in this litigation.

STATEMENT OF FACTS

The facts are depicted in the opinion of the Court of Appeal attached to this petition as Appendix A. At points they are cursory and additional facts contained in the transcript will be presented under appropriate headings below to facilitate clarity.

STATEMENT OF ISSUES

I. DEFENDANT METCALF WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The nature of Mr. Metcalf's complaint was that his retained lawyer at trial failed to adequately investigate possible defenses, consumed alcoholic beverages on occasion during the course of trial, and appeared in front of the jury prior to verdict in open court during the re-reading of certain testimony inebriated. He was unable to be sure the re-read was correct. See RT: 102-103.

Defendant Metcalf further complains that he did not receive a fair and complete evidentiary hearing by the trial court on the issue of effective assistance of counsel. He was precluded from introducing the testimony of several witnesses. It is contended that the trial court's precluding counsel for Mr. Metcalf from calling witnesses Holland, Macias, and Mrs. Macias to elicit factual details of trial counsel's failure to thoroughly prepare and investigate Mr. Metcalf's case violated his right to due process

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of law. The trial court further limited Mr. Metcalf's proof by quashing a subpena duces tecum for records of the Sacramento Bee's secret witness program and excusing officials from said newspaper from appearing and testifying at a hearing upon a motion for new trial.

Pertinent Facts. This attorney, who represented Mr. Metcalf pursuant to court appointment after verdict, moved the court for a new trial pursuant to 1181 P.C. (CT: 107-108). The matter came on for hearing September 30, 1974 (CT: 116). Previously, this attorney prepared and served a subpena duces tecum upon three witnesses from the Sacramento Bee Newspaper: to wit, Verne Bonette, Guy M. Sheridan, and John Hamlyn. John Downey, an attorney filed a motion to quash said subpenas that morning. The court granted the motion and excused the witnesses from further attendance (CT: 116) without granting counsel for Mr. Metcalf time he requested to respond to Mr. Downey's memorandum of points and authorities in support of his motion filed that very morning (RT 18:6-12). The court then quashed the subpenas and issued the following ruling:

> "The court bases this ruling upon the basis, the narrow ground that the subpenas call only for records relating to the witnesses Macias and Holland. They have testified. They were questioned with regard to the secret witness program.
> The information sought from them is for purposes of impeachment, and does not purport to be substantial evidence relating to the issue of guilty . . . (RT 18:28; RT 19: 1-6).

This attorney, representing Mr. Metcalf, stated there was an additional reason for seeking the records of the Bee. IT WAS ALSO RELEVANT AND MATERIAL TO THE ISSUE OF INEFFECTIVE REPRESENTATION AT TRIAL. See RT 19:13-17 and RT 8:28 and RT 9:1-6 and RT 12:10-14.

Later the court further limited the evidentiary hearing by

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granting the District Attorney's objection to Macias, Holland and Mrs. Macias testifying RT 143-RT 150. The thrust was towards trial counsel's inadequate cross-examination of Macias and Holland (RT 147:28 - RT 148:1-3). It should be remembered Mrs. Macias was never called as a witness at trial and Mr. Englebright, Metcalf's counsel at trial testified as follows: (RT 87:6-28)

Q. Did you or anyone under your employ ever interview Jimmy Macias?
A. No
Q. David Holland?
A. No
Q. Mrs. Macias?
A. Huh-uh, None of those witnesses.
Q. Did you or anyone under your employ ever contact the Sacramento Bee secret witness program?
A. Yes.
Q. Or persons in charge thereof?
A. Gene Hill

. . .

Q. Did you find anything out?
A. No.
Q. Did they state why they wouldn't?
A. Well, I don't think that I actually asked them anything . .

The Court of Appeal at page 8 of their opinion cited cases establishing the burden is upon Mr. Metcalf to establish a crucial defense was withdrawn and establishing he was prejudiced by a failure of counsel at trial. Yet, the trial court failed to give defendant a full and complete evidentary hearing on the issue.

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It is submitted that in so doing, the trial court abused its discretion and deprived defendant Metcalf of a full and fair hearing on the issue of Mr. Englebright's ineffectiveness. His rights under the Sixth Amendment and to due process were lost in this regard. Goldberg v. Kelly (1970) 397 U.S. 254; 25 L. Ed 2d 287; 90 S. Ct. 1011. Brooks v. Small Claims Court (1973) 8 Cal 3d 661; 105 Cal Pptr 785; 504 P. 2d 1249. "However, in every case the hearing required by the due process clause must be meaningful, Armstrong v. Manzo (1965) 380 U.S. 545,552. . ." Beaudreau v. Superior Court (1975) 14 Cal 3d 448,458; _____ Cal Rptr. _____; _____P. 2d _____.

This court is respectfully requested to review the hearing transcript with respect to the defendant's motion for new trial at this juncture. Please note repeated attempts by counsel to have the evidence admitted on the issue of Mr. Metcalf's trial counsel's ineffectiveness. See RT 2 through RT 21, and RT 143 through 151.

Trial Counsel's Ineffectiveness. It was clearly established at the motion for new trial that trial counsel failed to interview witness Holland, and Macias and a most germane witness on the issue of anticipated reward as to monies from the Sacramento Bee, Mrs. Macias, the mother of witness Macias. The reward aspect of their testimony was critical to the issue of their credibility and trial counsel failed to adequately prepare this aspect of his defense of Mr. Metcalf. He failed to interview the following:

1. Witnesses Macias and Holland (crucial identification witnesses);
2. Mrs. Macias;

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3. Officials of the Sacramento Bee Secret Witness Program. See the testimony of Mr. Englebright set forth at Page 5 of this petition. Further, note the superficiality of his contact with the Sacramento Bee Secret Witness Program. It is essentially no meaningful attempt to garner information at all, ". . . Well, I don't think I actually asked them anything. I contacted him (referring to Mr. Hill) because I might subpena one of them as a rebuttal witness, and I wanted to know who it was, who I should subpena." (RT 87:27-28; RT 88:1-2). Evidently, he never found out. He just talked to Mr. Hill (RT 88:11-12). By inference, he did not talk to the previously mentioned individuals from the Bee whose testimony was precluded by order of the trial court, and previously complained of this petition.

In short, Mr. Englebright was ill prepared to conduct an effective cross-examination of Macias and Holland relative to reward anticipation, and to impeach their testimony at trial. Substantial prejudice occurred thereby to Mr. Metcalf's defense.

Also, the photographic line-up identification pictures and the series and order of presentation to young Macias and Holland was critical. The jury exhibited particular interest in them by having the boys testimony re-read. See Vol. III RT 826-834. They recalled details of the identification more vividly after trial. See the offer of proof made at defendant's motion for new trial RT 143-151. This suggests erroneous testimony at trial.

Mrs. Arack. Due to inadequate investigation Mr. Englebright failed to discover an important witness who could have probably placed Mr. Metcalf at the antique show at the El Rancho Hotel, and more importantly at the site of the crime victim's truck prior to

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the theft in March, 1973. Exhibitor's were logical persons for defense counsel to contact. Unfortunately, time had taken a toll upon her memory by the time she was discovered during investigation subsequent to trial. Careful inquiry and investigation would have revealed her existence when her memory was fresh and vivid. She testified as to having seen defendant Metcalf before (RT 55: 26-28; RT 56:1-9). Although unsure as to the date, she stated she could have seen him at the El Rancho in March, 1973 (RT 56:13-19). See also RT 58:23-27. Defendant Metcalf was thus deprived of a substantial defense.

It is submitted that the Court of Appeal erred in not finding defendant's trial was reduced to a sham; crucial defense issues were withdrawn, and he was in fact prejudiced by failures of trial counsel. People v. Aikens (1969) 70 Cal 2d 369, 379; People v. Hill (1969) 70 Cal 2d 678, 688-689. Further, defendant Metcalf met his burden of proof to the extent of demonstrating prejudice notwithstanding the court's failure to allow a full and adequate proceeding to show trial counsel's ineffectiveness. It is clear trial counsel failed in his duty:

> "To conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf. . . " People v. Shells (1971) 4 Cal 3d 626, 630; 94 Cal Rptr 275; 483 P. 2d 1227.

Crucial aspects of Mr. Metcalf's defenses were indeed withdrawn. In Re Saunders (1970) 2 Cal 3d 1033, 1041-1042; 88 Cal Rptr 633; 472 P. 2d 921. The inadequacies complained of are not speculative. People v. Martinez (1975) 14 Cal 3d 533; ___ Cal Rptr ___; _____ P 2d _____; People v. Stephenson (1974) 10 Cal 3d 652,661; 111 Cal Rptr 556; 517 P 2d 820; People v. Strickland (1974) 11 Cal 3d 946,

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956; 114 Cal Rptr 632; 523 P 2d 672.

A. THE SHAM AND A FARCE TEST OF PEOPLE V. IBARRA et. seq. SHOULD BE RE-EXAMINED IN THE LIGHT OF DEVELOPING FEDERAL LAW AND COGENT CRITICISM.

The Sixth Amendment right to counsel is applicable to the states through the due process clause of the Fourteenth Amendment. Gideon v. Wainwright (1963) 372 U.S. 35,

The question thus presented rests upon the effectiveness of counsel and assessment in terms of fundamental fairness under due process of law Brubaker v. Dickson (9th Cir. 1962) 310 F 2d 30,37. Effective counsel is the gravemen of the Sixth Amendment and due process. It is submitted the sham and farce test presently utilized places a far heavier burden on a defendant ill served by poorly prepared counsel at trial. It is inconsistent with far lesser burdens of proof associated with violations of due process of law. By way of example, this court wrote:

> "In determining in advance of trial if a particular procedure or proceeding comports with the demands of due process, the courts have sought to ascertain whether in the absence of relief a REASONABLE LIKELIHOOD exists a fair trial cannot be had (citations omitted).
>
> Moreover, with respect to post-trial review, the United States Supreme Court has recognized for many years . . . certain procedures make it impractical to establish degrees of prejudice. . . . In these circumstances the defendant need not show that he was actually prejudiced during his trial in order to establish a denial of due process of law; IT IS ENOUGH IF HE CAN SHOW THERE WAS A RESONABLE PROBABILITY OF PREJUDICE (emphasis supplied) Gordon v. Justice Court (1974) 12 Cal 3d 323, 329;

The Court of Appeals presumed, and assumed certain factors about the defendant and trial counsel at page 9 of their opinion set forth in Appendix A. At the same place in the opinion the court

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the court rejected defendant Metcalf's assertion as to the secret witness program merely because some cross-examination was engaged in and argument as to improper motive was argued to the jury. The court itself engages in speculation without knowing what other facts, which could be far more probative than jury argument and could have been discovered upon careful, thorough investigation by trial counsel. Without knowing the facts, and with a record that shows a prima facie attempt to cover the fabrication motive, and by assuming Mr. Metcalf knew what he should tell his lawyer and assuming merely that trial counsel conferred with co-counsel from the public defender's office and that among materials were reports about Macias and Holland, is not the court engaging in an area wherein it is impractical to establish degrees of prejudice? A lesser standard is in order than the sham or farce test.

The Honorable David L. Bazelon, Chief Judge, United States Court of Appeals, District of Columbia has severely criticized the sham or farce test presently the law of California. He writes:

> "One common standard today is the 'Mockery of Justice' test under which representation is ineffective only where it makes the trial such a sham that it shocks the conscience of the court. The 'Mockery' test requires such a minimal level of performance from counsel that it is itself a mockery of the sixth amendment." Bazelon, David L., The Defective Assistance of Counsel; 42 Univ. of Cinci. Law Rev. 1, 28-29.

California law now seems to utilize the sham or farce test in some association with a due process standard.

> "That 'effective' counsel required by due process, however, is not errorless counsel; rather, it is counsel 'reasonably likely to render, and rendering reasonably effective assistance' (citations omitted)." In Re Saunders (1970) 2 Cal. 3d 1033, 1041; 88 Cal. Rptr. 633, 472 P. 2d 921.

Saunders goes on to the next page at 1042 and demands that inadequate or uncareful investigations result in the deprivation of a "crucial

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defense." This posture has been criticized as begging the question rather than answering what effective representation amounts to. See Finer, Joel J., Ineffective Assistance of Counsel (1973) 58 Cornell Law Rev. 1077, 1078. Finer suggests the adoption of a new standard which he describes as a modified malpractice test.

1. A particular attorney's practice should be evaluated in the light of normal custom and skill viz. normal competency; See P. 1079-1081 of his article cited above.

Bazelon argues that relief should be given to a defendant whose lawyer renders assistance that was not that of a reasonably competent and experienced defense attorney. He also strongly suggests that the burden should be upon the prosecution to show the absence of prejudice. Bazelon, David L., The Defective Assistance of Counsel, (1973) 42 Univ. of Cinci L. Rev. 32-33.

Federal Courts. The case of Moore v. United States (3rd Cir. 1970) 432 F. 2d 730, 737 has clearly held that counsel's performance under the Sixth and Fourteenth Amendment is to be measured by the standard of normal competency. A client is prejudiced by failure of counsel to perform at the level of normal competency. The court exhibited considerable insight into the problem:

> ". . . Representation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or FAILED TO INTERVIEW ESSENTIAL WITNESSES OR TO ARRANGE THEIR ATTENDANCE. Such omissions, of course, will rarely be visible on the surface of the trial, and to that extent the impression of the trial judge regarding skill and ability of counsel will be incomplete." Moore v. U.S. (1970) 432 F. 2d 730, 739.

This view was stressed in a dissenting opinion by Justice Marshall who was joined by Justice Brennan dissenting in denial of Certiorari in the case of Brescia v. New Jersey (1974) 417 U.S. 921, 924.

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The normal competency standard was also adopted in the case of U.S. et Rel Green v. Rundle (1970) 434 F. 2d 1112, 1113.

In a very recent case the District of Columbia Circuit of the Federal Court of Appeals observed:

> ". . . The effective assistance of counsel is defendant's most fundamental right for it affects his ability to assert any other right he may have. . . U.S. v. De Coster (1973) 487 F. 2d 1197, 1201.

The Court in De Coster adopted the following standard under the Sixth amendment:

> "A DEFENDANT IS ENTITLED TO THE REASONABLY COMPETENT ASSISTANCE OF AN ATTORNEY ACTING AS HIS DILIGENT ADVOCATE" U.S. v. De Coster, supra. P. 1202.

The opinion goes on to describe the duty of counsel to conduct factual and legal investigations. "THIS MEANS THAT IN MOST CASES A DEFENSE ATTORNEY, OR HIS AGENT, SHOULD INTERVIEW NOT ONLY HIS OWN WITNESSES BUT ALSO THOSE THE GOVERNMENT INTENDS TO CALL WHEN THEY ARE ACCESSIBLE. . ." U.S. v. De Coster, supra. P. 1204. The court holds that if a substantial violation is shown of any of these requirements, a defendant has been denied effective representation, unless the government can show a lack of prejudice thereby.

Defendant Metcalf was deprived of effective assistance of counsel at trial. This court should adopt the more modern standards described above and reverse his conviction. U.S. et. Rel Green v. Rundle (1970) 434 F. 2d 1112; Moore v. U.S. (3rd Cir. 1970) 432 F. 2d 730, 736-37; United States v. De Coster (D.C. Cir. 1973) 487 F. 2d 1197; Coles v. Peyton (1965) 389 F. 2d 224, 226; Cert. Den. 393 U.S. 849; 89 S. Ct. 80; 21 L. Ed 2d 120 (1968); U.S. v. Hayes (5th Cir. 1970) 444 F. 2d 472; Cert. Den. 404 U.S. 882; 92 S. Ct. 210; 30 L. Ed. 2d 163 (1971); West v. Louisiana (5th Cir. 1973) 478 F. 2d 1026.

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Importance of the question. It has been written:

> "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have" Schaefer, Federalism and State Criminal Procedure 70 Harv. L. Rev. 1,8 (1956).

The farce or a sham test facilitates marginal representation. Liberty is the most cherished principle in our society. Can our legal structure in California be left to deprive individuals of their freedom based on representation that is not reasonably competent in the light of normal skill and custom. It is a test associated with minimal compliance, not adequacy of representation.

From the standpoint of Mr. Metcalf, his liberty is presently infringed via probation a term of which orders him to pay restitution to the crime victim in the amount of $26,410.50. (CT 137-138).

II. JURROR MISCONDUCT: FAILURE TO FOLLOW THE LAW AS INSTRUCTED

The court instructed the jury upon defendant's request pursuant to CALJIC 2.60 which reads in pertinent part: ". . . you must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way." This instruction is designed to protect a defendant's Fifth and Fourteenth Amendment rights.

It is clear from the evidence at defendant's Motion for New Trial that certain jurrors commented upon the defendant's failure to take the stand. Jurror Holland recalled a woman jurror stating she wondered why they didn't take the stand (RT 27: 1-16). Jurror DaMassa recalled several jurrors remarking upon the defendant's failure to testify upon entering the jury room (RT 33: 15-28; RT 34: 1-12).

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Jurror Johnson recalled a comment on the subject inside the jury room, at the beginning of deliberations (RT 39: 5-24). Jurror Huff testified the defendant's failure to take the stand was discussed in the jury room (RT 45: 15-22). Jury Foreman Gobron testified as follows:

Q. I would like to ask if at any time during deliberations, did any jurrors comment or make any statements upon Mr. Booth or Mr. Metcalf not taking the stand to testify in their own defense?

A. Yes, they did.

Q. Okay, how many sir?

A. Three or four, maybe more. It was kicked around a little bit.

Q. Could you please tell us what you mean by kicked around a little bit?

A. Oh, during the process of discussing everything.

Q. Did this take place in the jury room?

A. Yes, sir.

Q. Okay, and approximately how far into deliberations were you?

A. I would say about halfway.

Q. Do you recall what was said?

A. Well, one statement was, didn't it seem strange to everyone that the defendants didn't take the stand in their own behalf.

(RT 51: 2-21).

It is submitted that the trial court could not reasonably have found that merely a single, random, casual remark occurred based on the evidence before it. It is clear from the record some jurrors disobeyed the court's instruction.

Is the jury free to disobey or vary the court's instructions?

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There is little law directly on this point in this state. It has been held that the duty of the jury to follow the law as laid down by the court is a cornerstone of jury trials. Sparf v. United States 15 U.S. 51, 64; 15 S. Ct. 273, 278. A California District Court of Appeal has intimated strongly that the jury is to be governed entirely by the instructions the court may give it. People v. Kiser (1937) 22 Cal. App. 2d 435, 439. Other states have so held. State v. McClanahan (1973) Kan. 510 P. 2d 153, 158; State v. Dazhan (1973) Ore. 516 P. 2d 92, 96; Aldridge v. State (1960) Tex. 342 S.W. 2d 104, 107-108; Ratliff v. State (1973) Tex. 490 S.W. 2d 844.

The instruction is very broad and forbids the entry of defendants failure to testify into deliberations . . . IN ANY WAY (emphasis supplied). The court's decision below and that of the Court of Appeal does not comply with the state of the evidence and should be overturned.

In view of the importance of this issue, its last being discussed by a court of this state in 1937, and the importance manifested by other state courts addressing the issue, this court is urged to define the responsibility of the jury in having to adhere to the court's instructions to the letter.

Also, the issue is of extreme importance to Mr. Metcalf, in that both courts' decisions below are contrary to the evidence.

Respectfully submitted,

Dated: July 16, 1975

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